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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 576

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, and STATE OF MISSISSIPPI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOE T. PATTERSON,
Attorney General of the State of Mississippi,

DUGAS SHANDS
Assistant Attorney General of the State of Mississippi,

PETER M. STOCKETT, JR.,
Special Assistant Attorney General of the State of Mississippi,

WILL S. WELLS,
Assistant Attorney General of the State of Mississippi,
Jackson, Mississippi,

FRANCIS T. ZACHARY,
M. M. ROBERTS,
Hattiesburg, Mississippi,
Of Counsel for Petitioners.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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No. .....

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, and STATE OF MISSISSIPPI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit hereinafter identified.

I.

CITATIONS TO OPINIONS BELOW

No decision or order has ever been entered by the United States District Court for the Southern District of Mississippi, from whence this cause should have come, the contentions of respondent notwithstanding to the con-

trary. The judgments of the United States Court of Appeals for the Fifth Circuit are dated July 15, 1963, and copies thereof appear hereto as Appendix "A" and "B" hereto; and copy of the opinion of said Court rendered on July 15, 1963, is attached hereto as Appendix "C", with the specially concurring opinion of Circuit Judge Bell.

II.

JURISDICTION

The judgments and opinion of the United States Court of Appeals for the Fifth Circuit were entered on July 15, 1963. A motion for rehearing was filed by petitioners but denied by the Court of Appeals on August 7, 1963, on the main appeal and on the same date on proceedings for civil contempt, and these additional orders are made parts hereof as Appendix "D" and "E" hereto, respectively. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1254(1).

III.

QUESTIONS PRESENTED

1. Do the orders of the Court of Appeals, here complained of, conflict with Sections 1921 and 1921(a)(1), 28 U.S.C.A., and the cases of *Baltimore Contractors* v. *Bodinger*, 348 U.S. 423, 75 L. Ed. 233, 75 S. Ct. 249, *Florida* v. *United States*, 285 F.2d 596 (8 Cir.), and *O'Brien* v. *Harrington*, 233 F.2d 17 (C.C.A., Dist. of Columbia)?

2. Do not the orders of the Court of Appeals for the Fifth Circuit require Theron C. Lynd to violate the laws of the State of Mississippi which have not been declared unconstitutional and have not been successfully challenged and which are presumptively valid?

(a) What effect does Article I, Section II, Clause 1 of the Constitution of the United States which provides: "The House of Representatives shall be composed of members chosen every second year by the people of the several states and the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," have upon the court of the United States and the State of Mississippi identified with voter rights?

(b) Do not the judgments and opinions of the Court of Appeals for the Fifth Circuit hereinabove identified require Theron C. Lynd to do that which is in violation of Section 244 of the Constitution of Mississippi; Section 3235 of the Mississippi Code of 1942, Annotated; Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 241-A of the Constitution of Mississippi (Pocket Part); Section 3209.6 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 3212.7 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 3217-01 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 3217-02 of the Mississippi Code of 1942, Annotated (Pocket Part); and Section 2111 of the Mississippi Code of 1942, Annotated, the text of all of which is fully set out in Appendix "F" hereto?

3. Is it possible to make an exception of the general rules affecting orderly administration of justice in civil rights cases and permit Circuit Court of Appeals of this nation to override and violate the application of Section 2281, 28 U.S.C.A., relating to the three judge court for determining the constitutionality of State laws and Constitution sections?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes of the United States and the State of Mississippi, the full text of which will be set out in Appendix "F" hereto:

1. The Fourteenth Amendment to the Constitution of the United States..

2. 28 U.S.C.A., Section 1291.

3. 28 U.S.C.A., Section 1292(a)(1).

4. 28 U.S.C.A., Section 2281.

5. Article I, Section II, Clause 1, Constitution of the United States.

6. Section 244 of the Constitution of Mississippi.

7. Section 3235 of the Mississippi Code of 1942, Annotated.

8. Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part).

9. Section 241-A of the Constitution of Mississippi (Pocket Part).

10. Section 3209.6 of the Mississippi Code of 1942, Annotated (Pocket Part).

11. Section 3212.7 of the Mississippi Code of 1942, Annotated (Pocket Part).

12. Section 3217-01 of the Mississippi Code of 1942, Annotated (Pocket Part).

13. Section 3217-02 of the Mississippi Code of 1942, Annotated (Pocket Part).

14. Section 2111 of the Mississippi Code of 1942, Annotated.

V.

STATEMENT OF CASE

The United States of America on July 6, 1961, filed complaint for relief under 42 U.S.C.A., Section 1971, being the 1957-1960 Civil Rights Act, and which complaint was not before the United States Court of Appeals for the Fifth Circuit; and on January 4, 1962, the United States of America filed motion for preliminary injunction seeking to cause uniformity of practices of registration of white and negroes by the Registrar of Forrest County, Mississippi, and which motion was not before the United States Court of Appeals for the Fifth Circuit; but there was filed with the said Court of Appeals on March 29, 1962, a "Motion for Injunction Pending Appeal or in the Alternative for a Writ of Injunction." In the absence of any record whatsoever, the Assistant Attorney General of the United States and attorneys of the Department of Justice in Washington, D. C., filed with the United States Circuit Court of Appeals for the Fifth Circuit, not a record or anything official from the District Court wherein the case was pending, but a "Memorandum in Support of the Petition for an Injunction" which is in 46 pages. Chief United States Circuit Judge Elbert P. Tuttle entered order for hearing on April 6, 1962, at the United States Courthouse, Houston, Texas, on motion for injunction or in the alternative for a writ of injunction under the All-Writs Statute, without an order from the United States District Court.

The Court at Houston, Texas, heard argument without an order and without a record and without anything before it excepting what lawyers had to say orally in open court plus that in writing contained in the record in this cause, which resulted in the Court announcing within ten minutes after the argument was concluded that the motion for injunctive relief was sustained and the parties were given oral notice thereof. On April 10, 1962, the Court of Appeals for the Fifth Circuit entered an opinion and order which is not reported in 301 F.2d 818, with copy thereof attached hereto as Appendix "G", and on April 16, 1962, said Court through the Honorable Elbert P. Tuttle, Chief Judge, entered a judgment. As of April 6, 1962, the Respondents, Petitioners here, had filed a motion to dismiss, but the Court never acted thereon. A brief was furnished in support thereof which the Court probably did not have time to consider in view of the early announcement of its conclusion after the argument with no opportunity to read and consider that contained in the brief. Respondents, petitioners here, sought on April 6, 1962, to get before the panel of judges sitting for said Fifth Circuit a Memorandum of Facts in Opposition to the Petition for Injunction and the Court had no opportunity to consider this after the argument was had. There was filed a Motion to Strike on April 6, 1962, which was never heard by the Court and which challenged the jurisdiction of the Court to have made possible the application of said Rule 75(g) of Federal Rules of Civil Procedure. In the certified copy of the record, in addition to opinion appearing as Appendix "G" hereto, there appears the order signed by Judge Tuttle on April 16, 1962.

Respondents, petitioners here, felt aggrieved at that done by the United States Court of Appeals for the Fifth Circuit when there had been no completion of hearing in

the United States District Court, and where the attorneys representing the Attorney General of the United States had used up all of the time in the United States District Court for their part of the hearing and knew that the defendants had no opportunity to put on testimony and the Court had no opportunity to enter an order and no order was entered and none of the Rules of Civil Procedure relating to manner of order and provisions for appeal were carried out or entered into in any kind of way, and under these circumstances a Petition for Rehearing with Brief thereon was filed on May 1. 1962; and as a part of that furnished to the Court there was certificate of the Reporter of the District Court disclosing the facts with reference to the pendency of the cause and that the District Judge had not heard the case in its entirety. The Petition for Rehearing was denied on May 21, 1962.

All of the above substantially appears in Petition for Writ of Certiorari filed with this Court in Cause Number 355; and all of that therein contained plus the record therein identified is referred to and made as much a part hereof as if copied herein.

Thereafter a panel of three judges was ordered or ordered themselves to convene and sit as a panel of judges for the United States Court of Appeals for the Fifth Circuit at Hattiesburg in Forrest County, Mississippi, where no Court of Appeals panel of judges had ever sat before or have ever been sitting since and with no rules of the Court therefor, and after a five day hearing they proceeded to ultimately order that Theron C. Lynd be held in civil contempt but delayed hearing on criminal contempt because of the fact that conclusion was apparently reached that in a contempt proceeding of the nature here involved where the result could be either in the nature of civil or criminal contempt by way of orders a jury trial should be

awarded; and this issue is now before this Court in the case of United States of America versus Ross R. Barnett, Governor of the State of Mississippi, and Paul B. Johnson, Jr., Lt. Governor of Mississippi, bearing Number 107 in this Court, and which has been set for hearing for argument before this Court on the 21st day of October, A. D., 1963; and with deference, we say that this Court should accept jurisdiction of this cause and make available to Theron C. Lynd and the State of Mississippi the same rights as were granted to the Governor and Lt. Governor of Mississippi in another similar proceeding and hearing before this court.

Finally, it should be stated that Theron C. Lynd has, on order of the Court of Appeals for the Fifth Circuit, in multiple ways violated his oath of office and the laws of the State of Mississippi when certain constitutional provisions of the State of Mississippi and certain statutory requirements have been ignored by compulsion and force of the orders of the Court of Appeals here complained of; and all of this was done by the Court of Appeals without giving any consideration to the application of Section 2281, 28 U.S.C.A., dealing with what is generally referred to as the three judge court for determining the constitutionality of state Constitutions and laws; and as far as the State of Mississippi and the United States of America and the world are concerned, said laws and said constitutional provisions are still applicable and Theron C. Lynd should be relieved of the requirements of an Appellate Court to violate the laws of his state and the Constitution of his State, which he has sought to uphold, so long as such laws and the Constitution have not been determined void. Further, it should be stated that this is no longer a negro voting case because all of the negroes who were identified as having attempted to register have now been reg-

istered insofar as it is possible for them to be registered by the Clerk of the Circuit Court or registrar, as the case may be, and Theron C. Lynd has totally complied with the orders of the United States Court of Appeals for the Fifth Circuit and thereby purged himself of civil contempt; but he is in contempt of the laws and statutes of the State of Mississippi which are still on the law books of this state; and this presents a very serious question where a Court of Appeals, with no record before it, takes the word of some civil rights attorney and holds a registrar in contempt simply because he does not proceed to violate his oath of office, which Theron C. Lynd has already been required to do by the Court of Appeals for the Fifth Circuit, and this should not be so; and we appeal to the highest Court of this land to make a record of what is right and wrong in this field of endeavor. We need help.

VI.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the Fifth Circuit erred as follows:

1. In holding that it had jurisdiction of the cause when the United States District Court had not entered an order from which an appeal could be taken as contemplated by Rule 54(a) of Federal Rules of Civil Procedure.

2. In failing to recognize that no judgment or order had been entered and no compliance had been had with Rule 58 of said Rules of Civil Procedure and that there had been no compliance with Rule 79(a) of said Rules of Civil Procedure which requires the Clerk of the Court to make a brief notation on the docket showing the substance of each order, and until this notation is had there could be

no finality to anything done by said District Court and there could be no appeal.

3. In holding that the Court had jurisdiction over the controversy when there was total failure of plaintiff, Respondent here, to comply with and conform to Rule 75 of Federal Rules of Civil Procedure, and particularly Rule 75(g) thereof.

4. In holding that there existed before the Court controversy within the meaning of Article III, Section 2, of the Constitution of the United States, between the United States of America and the State of Mississippi in this cause.

5. In holding Theron C. Lynd in civil contempt in spite of the fact that he had followed the orders of the Court and violated the laws of the State of Mississippi and the Constitution thereof, all as hereinabove set forth.

VII.

REASONS RELIED ON FOR GRANTING THE WRIT

The opinions of the Court of Appeals for the Fifth Circuit failed to recognize many fundamental issues of law; and in the application made of the absent record and of rules controlling same, the Court denied your Petitioners due process and equal protection of the law guaranteed to them by the Constitution of the United States as interpreted by the Supreme Court of the United States.

There was a total absence of consideration by the Court of Rules 54, 58, 75(g) and 79(a) of Federal Rules of Civil Procedure. If the Court of Appeals had awaited a time with patience when the District Court could have heard the matter and reached some reasonable opinion based on the facts and law applicable thereto at the time, then a judgment would have been entered and all neces-

sary records would have been made in the trial court and the appeal would have been as contemplated by said Rule 75; but this was not so and there was a hurried hearing not supported by law or reason.

In addition to the foregoing, the Court of Appeals did what Circuit Court Judge Bell identified as what courts should not do, and which Judge stated that the Court of Appeals "might have avoided the necessity of this court taking the case over prior to a decision in the District Court. It would have avoided the multitudinous handling, by way of contempt hearing and otherwise, since the grant of the original relief by this Court, with no further action having been taken in the interim on the main case in the District Court. This case serves as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice when courts depart from the time-tested processes of law." We were quoting from the last paragraph of the concurring opinion of Circuit Judge Bell rendered on July 15, 1963.

The most humble citizen of the American Republic who has understanding must recognize that courts and men, public officials everywhere, are granted that respect which they duly deserve. Lawyers in this nation are concerned when courts require public officials of a given state to violate the valid laws of that state, which is what the Court of Appeals for the Fifth Circuit has done with Theron C. Lynd and indirectly with the State of Mississippi. This is a dangerous precedent which must be destructive to the American way of life. Here Theron C. Lynd has been required by court order of an Appellate Court to violate his own state laws and to violate his own state Constitution when such laws and such Constitution still control all of the people of the State of Mississippi except Theron C. Lynd because the constitutionality thereof has not been

challenged, the "time-tested processes of law" have not been used to determine the constitutionality thereof. The invalidity as far as Theron C. Lynd is concerned is made so by the sweeping order of the court with no right or authority therefor and with no right vested in the panel of judges who made the order. This nation cannot last as a nation of laws if the courts of the land are the ones first to violate the laws and to require others, under threat of contempt, to violate same. Here Theron C. Lynd is held in contempt for not having violated the laws and he was ultimately required to violate the laws and still he was held in contempt. We can only appeal to this court as a court of last resort to see that justice is done.

1. The appellate court had no order before it of the District Court because there was none, and the Federal Court and the appellate court had no jurisdiction of its own to protect, and as stated by Circuit Judge Bell in his concurring opinion of July 15, 1963, "it was more properly a matter for mandamus."

We call to the attention of the Court that contained in brief for respondents, petitioners here, filed in the Circuit Court of Appeals for the Fifth Circuit when there was hearing at Houston, Texas, on April 6, 1962. It should also be mentioned that in the cases of *McGuire* v. *Todd*, 198 F.2d 60 (5 Cir.), 97 L. Ed. 649, and *Tucker* v. *National Linen Service Corporation*, 200 F.2d 858 (5 Cir.), that court held that pleadings in civil rights cases must be stated with particularity in order to grant a motion for production under Rule 34 of Federal Rules of Civil Procedure. Said Court in denying relief relied upon the cases of *Piest* v. *Tide Water Oil Co.*, 26 F. Supp. 295, and *Employers Mutual Liability Insurance Company* v. *Blue Line*, 2 F.R.D. 121, and *Hartford Bank & Trust Company* v. *E. F. Drew & Company*, 13 F.R.D. 127. These cases ought still

to be the law and if applied here would require a different conclusion from that reached by said Court of Appeals for the Fifth Circuit even though there had been a record. We desire to call to the attention of this Court that appeals to the Circuit Court of Appeals are limited to statutory appeals and in this instance are limited to 28 U.S.C.A., Section 1291, or to Section 1292(a)(1) thereof. We quote from said Section 1291 and Section 1292(a)(1) as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." *28 U.S.C.A., Section 1291.*
>
> "(a) The Courts of Appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the District Court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; * * *." *28 U.S.C.A., Section 1292(a)(1).*

This Court has spoken on this through Judge Reed, speaking for five members of this Court, and Judge Burton speaking for himself, and then there was the dissent by Judges Black and Douglas. Stated differently, six of the eight judges participating were behind the opinion from which we here quote as follows:

> "This court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized exten-

sion or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 451, 79 L. Ed. 583, 586, 55 S. Ct. 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 99 L. Ed. 233, 75 S. Ct. 249.

We must recognize that courts do differ about constructions and thus the reason why sometimes the law is not the same all over this country and this may be the reason why this Court sometimes takes jurisdiction because there is different law found in different Circuits under the same subject matter. We are here dealing with 28 U.S.C.A., Section 1292(a)(1). This very section was before the United States Court of Appeals for the Eighth Circuit on December 22, 1960, when a decision was handed down by Judge Ban Woosterhout. In that case there was considerable discussion, but the part which we desire to call to the attention of the Court, and for the reason that the Court of Appeals for the Fifth Circuit has indicated that liberal construction ought to be given to the statute so as to get to a desired end, is as follows:

> "Appellants argue that the December 31 order is in practical effect the appointment of a receiver. The answer to this contention is that statutes authorizing interlocutory appeals are to be strictly construed. Changes in appeal jurisdiction should be made by appropriate legislation, not by judicial modification. 'It is the responsibility of all courts to see that no unau-

thorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system.' Baltimore Contractors v. Bodinger, 348 U.S. 176, 181; 75 S. Ct. 249, 99 L. Ed. 233. The court there held that an order refusing to stay a trial for arbitration proceedings did not constitute a refusal to grant an injunction and hence did not authorize an interlocutory appeal." *Florida v. United States*, 285 F.2d 596.

May we suggest that the Eighth Circuit felt obligated to follow this Court in the *Baltimore Contractors* case aforesaid. In the *Florida* v. *United States* case last above cited, in quoting from the case of *Shirvin* v. *Mesta*, 141 F.2d 668 (10 Cir.), a very few words imply what we are trying to say here, and thus, "But on appeal from an appealable order or from the final judgment. * * *" *Shirvin* v. *Mesta, supra.* It will be noted that the Tenth Circuit, as did the Eighth Circuit and as did this Court, felt that there must be an appealable order or a final judgment and there was neither here. In the memorandum filed by the Government before the said Court of Appeals for the argument on April 6, 1962, there were cited cases in support of contention that it was not necessary for an order to be entered by the District Court in order to take an appeal under 28 U.S.C.A., Section 1291 or 1292(1), and these cases are: *Connell* v. *Dulien Steel Products*, 240 F.2d 414 (4 Cir.), *Ettelson* v. *Metro Ins. Co.*, 317 U.S. 188, *General Electric Co.* v. *Marvel Co.*, 287 U.S. 430, and *United States* v. *Wood*, 295 F.2d 772 (5 Cir.). In the *Connell* case, *supra*, decided by the Circuit Court of Appeals for the Fifth Circuit, the District Court granted a temporary restraining order without any time limitation as prescribed by the Federal Rules, and the "restraining order" remained in effect longer than ten days. The question there was whether the "restraining order" became a "temporary injunction," and thus appealable under 28 U.S.C.A., Section

1292(1) at the expiration of the ten day period. The Court there said that it was unnecessary for it to determine whether the order should have been designated as a preliminary injunction rather than a temporary restraining order. Significantly enough, the Court held that the "temporary restraining order" did not become a "temporary injunction" by the expiration of the ten day period, and dismissed the appeal. Surely, *Connell* presents a much stronger case for the application of the "practical effect doctrine" urged by the United States than does the case at hand in which the District Judge specifically declined to take any action upon the injunction until the hearing had been completed and all of the evidence heard.

In holding that the appeal was not proper in *Connell, supra*, Judge Tuttle, writing for the Court, made the following proper ruling:

> "The practical reasons for not generally allowing appeals from temporary restraining orders are that * * * (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts. * * *
>
> "It is not at all clear that the Court below would actually have granted a preliminary injunction, for there are several legal questions that might well have been passed on at such a hearing. Orderly procedure requires that the trial court be given the opportunity of passing on these legal matters at the time of the hearing of the motion for preliminary injunction. * * *" *Connell* v. *Dulien Steel Products, supra.*

The rationale of the *Ettelson* case, *supra*, and the *General Electric* case, *supra*, is similar to *Connell, supra*. In *Ettelson* this Court held that an order of the District Court setting a hearing on a counterclaim which prayed for an injunction against further prosecution of the com-

plaint prior to trial on the issues formed by the complaint and answer was equivalent to the granting of an injunction against the prosecution of the complaint on theory that a stay by a court of equity of proceedings at law is an injunction, and thus appealable. In the *General Electric* case, *supra*, plaintiffs brought an action against defendant for infringing of patent rights and in their answer defendants set up a counterclaim alleging that plaintiffs were infringing their patent rights and prayed for injunctive relief. The Court entered an order dismissing the counterclaim, and the defendants appealed on the ground that the dismissal constituted a denial of the injunction. This Court held that the order of dismissal of the Counterclaim praying for injunctive relief was a denial of an injunction and thus appealable. None of these cases do violence to the position we take; none of these cases give any comfort, when properly analyzed, to the contention made for the Government of the United States. In every one of these cases there was an order entered by the District Court, and there is no semblance of an order here and there is no semblance of a correlation or any kind of analogous thinking between those cases and the problem we have here and they are simply no authority for what the Court of Appeals for the Fifth Circuit has done; but on the contrary, they positively and affirmatively support the position taken for Petitioners in this cause.

Other cases cited by the opposition before the Court of Appeals in support of that which said Court has done are just as far away from the law necessary to make possible any such holding as said Court has now sought to have done.

As an anti-climax of the presentation here sought to be made and with view of further showing the great divergency of view and surely diversion with that done by

the Court about which we are making complaint, the United States Court of Appeals for the District of Columbia said of attempted appeal where there had been no compliance with Federal Rules of Civil Procedure, and particularly Rule 79(a), the following:

> "Rule 79(a) of the Federal Rules of Civil Procedure requires the clerk to enter in the civil docket a brief notation showing the substance of each order and judgment of the court. Rule 58 provides that such notation in the civil docket constitutes the entry of the judgment; and the judgment is not effective before such entry. Until the order or judgment is entered in the civil docket, the case is still in the District Court, there is no finality, and there can be no appeal." *O'Brien* v. *Harrington*, 233 F.2d 17. (Dist. of Col.)

We quote from the first paragraph of the specially concurring opinion of Circuit Judge Bell, rendered on July 15, 1963, identified with the powers of the Court and the failure of the Court to do what time-tested processes of law contemplate and require. Stated differently, Judge Bell recognized that the Court of which he was a part had failed in itself; and in spite of this Theron C. Lynd is held in contempt of a court which is admittedly violating the time-tested processes of law. We quote as follows:

> "I concur, with the following additional statement. This court had the power under the All Writs Statute, 28 U.S.C.A., § 1651, to take the action it took on the former appeal. United States versus Lynd, 5 Cir., 1962, 301 F.2d 818. However, in my judgment it was more properly a matter for mandamus. The issue did not go to a denial of temporary relief as such, but to a delay in granting or denying the relief and this court should have spoken to the District Court through a Writ of Mandamus." *United States of America* v. *Theron C. Lynd et al.* (Unreported).

2. In the absence of the official record duly certified by the Clerk of the District Court as provided by Rule 75(g) of Federal Rules of Civil Procedure, no facts or proceedings were before the Circuit Court of Appeals for the Fifth Circuit, even if there had been an order, and there has been none.

Rule 75 of Federal Rules of Civil Procedure deals with the kind of record which must be had on appeal to a court of appeals and sub-section (g) thereof provides that the record must be prepared by the clerk and necessary parts are identified, and said sub-section (g) of said Rule 75 is as follows:

> "The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusion of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; *the opinion; the judgment or part thereof appealed from;* the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The Clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals." *Rule 75(g), Federal Rules of Civil Procedure.*

Please note from the record and from all therein contained that there is no seal of the Clerk of the District Court, there is no certificate, there is no compliance with any part of sub-section 75(g), and there is no opinion of

said District Court because said Court had not gotten through with the case and there is no judgment because there is no judgment which has been entered and there is no part of a judgment, and there is no semblance of any kind of order and said Circuit Court of Appeals did not have before it what Rule 75(g) requires; but it may be in civil rights cases that these Federal Court Rules do not apply and that we ignore them and ignore all the other great laws of the land dealing with states rights and the stable rights of the majorities and other human rights which have been in existence since the beginning of man and simply be sure that those who have written the civil rights law can do no wrong. In all of the decisions of the courts heretofore there has been a great effort to dignify these Federal Court Rules which were a part of the creative imagination of the Supreme Court of the United States. Courts have generally held that a transcript not certified by the Clerk of the District Court *does not become a part of the record on appeal and will not be considered and* this is particularly so where its accuracy and completeness is attacked; and we have sought to attack the accuracy and the completeness of that which was presented in this cause, and in addition thereto, there is no semblance at trying to in any kind of remote way comply with Rule 75(g) in this cause by the Government of the United States and we do believe that some of the attorneys for the Government of the United States may make errors. We only here seek the assistance of this Court to determine whether there is error which has been made by the Government in trying to get relief from said Circuit Court of Appeals when it was not in the position jurisdiction wise or otherwise to grant any relief or to do anything whatsoever which would be satisfactory to the office of the Attorney General of the United States. On this general subject

the Circuit Court of Appeals for the Seventh Circuit, in dealing with Rule 75(g), was much concerned with a transcript of record which was not certified by the clerk and held that same never became a part of the record because there was no compliance with Rule 75(g). There was an additional transcript of the record and the court held that the compilation was not a part of the record. We quote from the opinion as follows:

> "National also moved to strike the additional transcript of record for the reason that the transcript filed was not certified by the Clerk of the District Court. As we have pointed out above, it is true that the additional transcript filed in the office of the Clerk of this Court was not so certified. For that reason the additional transcript never became, and is not now, a part of the record on these appeals." *In re Chapman Coal Co.*, 196 F.2d 779.

There must not only be an order but there must also be a record and that is what we are trying to argue here; and in the same case we have quoted from last above we quote again as follows:

> "Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by evidence which might have been adduced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to

positively show the alleged error." *In re Chapman Coal Co., supra.*

What we are trying to say from the opinion above, and we could quote many of them, is that every appeal contemplates an order and every order carries with it the presumption that it is correct and the only way that said Circuit Court of Appeals could get jurisdiction or assume jurisdiction or attempt to protect its own jurisdiction is that an order be entered. Until there is an order, said Court must be silent. It must know that it had no jurisdiction and it should not have taken jurisdiction when it had none. Our whole jurisprudence is based on this kind of situation and we appeal to this Court to look at this for the sake of protection of our judicial system in this nation. Somehow we believe that people get excited about the so-called "civil rights" and forget every single solitary thing that has ever existed in this nation under the law. We talk about Law Day and World Court and decisions under the law; and in this nation of ours which is promoting this kind of thing with the President of the United States making a part of the headlines his own pictures for Law Day last year, there is another challenge to us that we in the name of humanity and for the protection of humanities be careful that we not encroach upon the terms and provisions of the Constitution of the United States and that we not encroach upon the simple proceedings and procedural requirements brought to us under the common law and by statutes. Court-made law belonging to legislative bodies is a dangerous thing. In this day some of us feel that the judiciary is becoming legislative in many areas of our living and it is hoped that the three departments of Government contemplated by the Constitution of the United States will never tend towards destroying us or dragging us into grave misunderstandings

between ourselves about what the law is or what it ought to be.

The Court of Appeals for the Ninth Circuit has held that the record on appeal must show the judgment appealed from. If it does not, the appellate court may direct that the record be supplemented. We refer to the case of *United States Fidelity & Guaranty Co.* v. *Anderson Construction Co.*, 260 F.2d 172.

In a case arising in the Ninth Circuit with decision dated January 5, 1959, and with the opinion written by Circuit Judge Barnes, it was held that the Federal Rules do not require a transcript or even a part of it to be part of the record on appeal, but it is further held that the Court of Appeals could decide only questions which could be determined from what record there was before it, and all others must be presumed waived. In the particular case to which we refer there was something for the Court to decide but it specifically decided that it could only consider official records, and that is to say records which come by way of the Clerk of the District Court where there is a proper certificate and where there must be knowledge on behalf of the Court of Appeals that it is a genuine official record. Such is not the case here and we quote from the case of the Ninth Circuit in part as follows:

> "The first question presented then is whether, with no record before us, and no question raised on this appeal, either as to the legal sufficiency of the complaints in intervention to state a cause of action, or as to the fairness of the instructions given, there is anything before this Court upon which it can rule." *Springer* v. *Best*, 264 F.2d 24.

As said Rule 75(g) of Federal Rules of Civil Procedure affects the rights of the parties and has a controlling force

thereto, there likewise are Rules 54(a), 58 and 79(a) and we shall make no further reference thereto but all of same are rules affecting the rights and powers of District Courts and of Courts of Appeal.

3. The United States Court of Appeals for the Fifth Circuit violated so many time-tested processes of law, they being an assignment of judges to proceed to Hattiesburg, Mississippi, for a hearing which lasted five days; and two of the judges of the panel, Judges Brown and Wisdom, have recently been identified in dissenting opinion of Circuit Judge Cameron in the case of *Armstrong* v. *Birmingham*, which is not yet in the reported cases. The Court should have resorted to mandamus proceedings if there was determination that the subject matter of the litigation be lifted from the United States District Court to the Court of Appeals; and the Court of Appeals for the Fifth Circuit should not have required Theron C. Lynd, by order of the Court, to violate the statutes and Constitution of the State of Mississippi as was done; and the whole proceeding has resulted in disorder and misunderstanding and in multiple law violations.

Theron C. Lynd was compelled to act in disregard and violation of the cited constitutional and statutory provisions of the State of Mississippi. He is and will continue to be subject to the penal sanctions of Section 2111 of the Mississippi Code of 1942, appearing in Appendix "F" hereto. None of the constitutional and statutory provisions of the State of Mississippi hereinabove referred to have been attacked as unconstitutional in this cause; no court has ever held or been called upon to hold that any of the constitutional and statutory provisions are invalid or unconstitutional. Each of these constitutional and statutory provisions are presumptively valid and constitutional and of binding force and effect upon the parties to this

cause. This required violation of the State laws and Constitution by the Court orders here complained of is the most serious of all of the matters raised herein; and if we cannot get this Court to come to our rescue, the consequences nationwide will be sad indeed.

The judgments and orders of civil contempt and the opinions of the Court of Appeals for the Fifth Circuit have all compelled Theron C. Lynd to act in disregard of and in violation of constitutional and statutory provisions of the State of Mississippi which are presumed to be valid and which have not been challenged as to constitutionality. We refer to same as follows:

Sub-section (b) of the Judgment and Order of Civil Contempt, found on Page A9 of Appendix "B", which orders petitioner to give any negro applicant for registration only certain specified sections of the Constitution of Mississippi to copy and interpret is violative of Section 244 of the Constitution of Mississippi (Page A21 of Appendix "F"), Section 3235 of the Mississippi Code of 1942, Annotated (Page A22 of Appendix "F"), and Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part) (Page A23 of Appendix "F"). Said constitutional provisions and statutes provide in essence that one of the qualifications for registration and voting is that a person shall be able to read and write any section of the Constitution of Mississippi and give a reasonable interpretation thereof to the county registrar. The Constitution of Mississippi contains some 285 sections, and it is a valid requirement for registration in Mississippi that an applicant be able to read and write and give a reasonable interpretation of any of these sections. It is left to the judgment and discretion of the registrar to determine which of these sections should be given any applicant for regis-

tration. The terms and provisions of said Sub-section (b) which restricts the registrar in his choice of sections to give negro applicants for registration to 14 sections of the Mississippi Constitution is clearly violative of these valid and constitutional provisions.

The provision of Sub-section (c) of the Judgment and Order of Civil Contempt (Page A10 of Appendix "B") which orders petitioner to cease registering the applications of negro applicants and to cease denying registration of negro applicants on the grounds that they made errors or omissions on their application form, if the applicant meets certain substantive qualifications, is in direct violation of Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part) (Page A23 of Appendix "F"), which provides in pertinent part that no application shall be approved or the applicant declared qualified to register to vote unless *all* blank spaces in the application and the oath are properly and responsively filled out by the applicant, and that the oath, as such, shall be signed by the applicant, and that the application, as such, shall be signed separately by the applicant at the place thereon provided for applicant's signature.

This portion of Sub-section (c) of the Order clearly compels petitioner to violate the mandatory provisions of said Section 3213.

That portion of Sub-section (c) of said Judgment and Order of Civil Contempt (Page A10 of Appendix "B") which orders petitioner to cease rejecting the applications of negro applicants who possess certain qualifications is directly violative of Section 241-A of the Constitution of Mississippi (Page A25 of Appendix "F") and its implementing statutes, Sections 3209.6 of the Mississippi Code (Page A25 of Appendix "F"), Section 3212.7 of the Missis-

sippi Code (Page A26 of Appendix "F"), Section 3217-01 of the Mississippi Code (Page A28 of Appendix "F"), and Section 3217-02 of the Mississippi Code (Page A28 of Appendix "F").

Section 241-A of the Mississippi Constitution, *supra*, provides that in order for a person to be entitled to register to vote, such person shall be of good moral character, and that the Legislature shall have the power to enforce the provisions of that section by appropriate legislation.

Section 3212.7 of the Mississippi Code, *supra*, provides in substance that before the registrar gives consideration to the sufficiency of the application the registrar shall have the name and address of the applicant published for two weeks in a newspaper with county-wide circulation, and that within 14 days after the date of last newspaper publication, any qualified elector of the county other than the registrar, may challenge the good moral character of the applicant and any other requirement which applicant must meet in order to be qualified to register. In the event such a challenge is made, the registrar shall within a reasonable time determine whether applicant is entitled under the Constitution and laws of the State of Mississippi to register to vote.

Section 3217-01 of the Mississippi Code, *supra*, provides that the good moral character of an applicant to register to vote is material to his right to register.

Section 3217-02 of the Mississippi Code, *supra*, provides for the challenge of any applicant to register by a qualified elector of the county on the grounds of lack of good moral character or any other requirement for registration.

It is obvious that this portion of Sub-section (c) of the Judgment and Order of Civil Contempt compels petitioner to ignore and violate the above cited good moral character requirements for registration, which requirements are presumed to be valid and constitutional.

Having demonstrated that various terms and provisions of the Judgment and Order of Civil Contempt compel petitioner to act contrary to, and in violation of, several valid provisions of the Constitution and laws of the State of Mississippi, we will now show that such action by the Court of Appeals was contrary to the settled law.

At *28 Am. Jur.*, Page 689, *Injunctions*, Section 186, the general rule is stated thusly:

> "Preventive relief against the enforcement of statutes is in most instances predicated on invalidity, for it is quite settled that equity will not attempt to restrain the carrying into operation of a valid enactment."

Many cases are cited in support of this statement in American Jurisprudence, including *Stafford* v. *Wallace*, 258 U.S. 495, 66 L. Ed. 735, and *Weber* v. *Freed*, 239 U.S. 325, 60 L. Ed. 308.

The Supreme Court of the United States, in discussing this type situation, stated:

> "Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties." *Hawks* v. *Hamill*, 288 U.S. 52, 77 L. Ed. 610.

In another case, the Supreme Court of the United States made this statement of the rule:

> "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. Fenner v. Boykin, 271 U.S. 240, 243, 244, 70 L. Ed. 927, 928, 46 S. Ct. 492; Massachusetts State Grange v. Benton, 272 U.S. 525, 527, 71 L. Ed. 387, 390, 47 S. Ct. 189; Matthews v. Rodgers, 284 U.S. 521, 525, 76 L. Ed. 447, 451, 52 S. Ct. 217; cf. Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264, 273, 78 L. Ed. 307, 313, 54 S. Ct. 154." *Pennsylvania* v. *Williams*, 294 U.S. 176, 79 L. Ed. 841.

Our search of the controlling authorities fails to reveal a single case in which any Court has done that which the United States Court of Appeals for the Fifth Circuit has ordered done in this cause.

In causing the petitioner to violate and disregard the above-mentioned constitutional and statutory provisions of Mississippi, the Court of Appeals is subjecting petitioner to the criminal sanctions imposed by Section 2111 of the Mississippi Code of 1942, *supra* (Page A28 of Appendix "F"), which provides that if any registrar shall register any voter not entitled to registration, he shall be punished, on conviction by imprisonment for not less than one year nor more than three years. It is manifestly unfair and oppressive to put petitioner, Theron C. Lynd, in the position of subjecting himself to the penal sanctions of the criminal laws of the State of Mississippi in order to comply with the terms of an injunction. Petitioner earnestly submits that this fact and circumstance, in and of itself, is sufficient grounds for the granting of this petition.

The judgment and order of Civil Contempt is clearly in violation of the letter, spirit and intent of the three-judge statute, 28 U.S.C.A., Section 2281, which provides

that no injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any State officer in the enforcement of such statute, shall be granted by any court, except by a three-judge district court.

The Court of Appeals should not be permitted to thus circumvent the clearly expressed policy of Congress in enacting said Section 2281.

Another reason why the petition should be granted is that the operation and effect of said Judgment and Order of Civil Contempt is to deny the equal protection of laws to the white citizens of Forrest County, Mississippi. Said Judgment and Order of Civil Contempt requires petitioner to apply only certain of Mississippi's valid requirements for registration to negro applicants for registration, but leaves in total effect all of Mississippi's requirements for registration in said County as to white applicants for registration. In short, under the terms of the Court order, white applicants for registration must comply with the good moral character requirements, and must be able to read and write and give a reasonable explanation of any section of the Constitution of Mississippi, and must completely and responsively fill out all blanks in the application form, while, on the other hand, negro applicants for registration are completely exempt from meeting and complying with these valid requirements of Mississippi law. It has been settled since the case of *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884, that if the United States violates the "equal protection clause" of the Fourteenth Amendment, that such also constitutes a denial of "due process of law" protected from Federal violation by the Fifth Amendment.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that this petition should be sustained and writ of certiorari issued as contemplated by law.

JOE T. PATTERSON,
Attorney General of the State of Mississippi,

DUGAS SHANDS,
Assistant Attorney General of the State of Mississippi,

PETER M. STOCKETT, JR.,
Special Assistant Attorney General of the State of Mississippi,

WILL S. WELLS,
Assistant Attorney General of the State of Mississippi,
Jackson, Mississippi,

FRANCIS T. ZACHARY,
M. M. ROBERTS,
Hattiesburg, Mississippi,

By _____,
M. M. ROBERTS,
Of Counsel for Petitioners.

APPENDIX "A"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,576

(MAIN APPEAL)

UNITED STATES OF AMERICA,
Appellant,

vs.

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, STATE OF MISSISSIPPI; STATE OF MISSISSIPPI,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before BROWN, WISDOM and BELL, Circuit Judges.

Judgment and Mandate

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, counsel for the parties having waived oral argument;

ON CONSIDERATION WHEREOF, It is now here ORDERED, ADJUDGED, AND DECREED by this Court

that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court; and

It is FURTHER ORDERED, ADJUDGED, AND DECREED that until such time as the District Court for the Southern District of Mississippi finally disposes of this cause, the injunction orders heretofore issued on April 10, 1962 and April 16, 1962, shall be, and hereby are continued in full force and effect, the terms and provisions thereof being that:

> The defendants, their agents, employees, successors, and all persons in concert with them are hereby enjoined from engaging in discriminatory acts and practices based on race in the registration for voting in Forrest County, Mississippi, and they are expressly enjoined from:
>
> (1) Denying Negro applicants the right to make application for registration on the same basis as white applicants;
>
> (2) Failing to process applications for registrations submitted by Negro applicants on the same basis as applications submitted by white applicants;
>
> (3) Failing to register and to issue registration cards to Negro applicants on the same basis as white applicants;
>
> (4) Denying Negro applicants the right to be registered by the same office personnel and with the same expedition and convenience as are being permitted to white applicants, and from failing or refusing to give to Negro applicants the same privileges as to reviewing their application forms at the time they are filled out and advising Negro applicants of such omissions as appear on their forms as they are

now or heretofore have given to white applicants under similar circumstances;

(5) From administering the constitutional interpretation test to Negro applicants by including as sections to be read and interpreted any sections other than those which at the time of the trial had been used for submission to white applicants;

(6) From requiring rejected Negro applicants to wait any different period before reapplying for registration than may be authorized under the laws of Mississippi and other than is required of white applicants.

This judgment and mandate, continuing said prior orders, shall be effective immediately and shall be transmitted forthwith to the Clerk of the District Court for the Southern District of Mississippi, and certified copies thereof shall be sent forthwith by the Clerk of this Court to each party; said service to be made upon counsel of record.

Entered and Issued: July 15, 1963

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ G. F. Ganucheau
(Seal) Deputy

New Orleans, Louisiana JUL 15 1963

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner, vs. THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, STATE OF MISSISSIPPI, Respondent.	**Civil No. 19,576 (Civil Contempt)**

Judgment and Order of Civil Contempt

Before BROWN, WISDOM and BELL, Circuit Judges.

Pursuant to the findings of fact, conclusions of law entered this date;

1. It is ADJUDGED that Theron C. Lynd, respondent, is guilty of civil contempt of this Court for violating, after notice and service thereof on April 18, 1962, the orders of this Court of April 10, 1962 and April 16, 1962.

2. It is further ORDERED and ADJUDGED that Theron C. Lynd perform and continue to perform and instructs his deputy registrar and other agents or employees who perform any administrative or other duty in connection with the registration of voters in Forrest County, Mississippi, to perform and continue to perform the following:

a. place upon the current voter registration rolls of Forrest County, Mississippi, and to do all other acts necessary to complete the registration for voting in Forrest County of the following Negro citizens who applied for and were illegally denied registration in Forrest County, Mississippi, including sending to such Negro citizens by United States mail postage prepaid, registration cards ordinarily used in Forrest County identifying such citizens as registered voters in Forrest County; such registration to be effective in all respects and for all purposes as of the date of the most recent application of the respective citizens:

Constance J. Baker
402 Dumas Avenue
Hattiesburg, Mississippi

John M. Barnes
200 E. 5th Street
Hattiesburg, Mississippi

Kenneth George Beard
Kelley Settlement
Forrest County, Mississippi

Gloria Maxine Bivins
202 Ashford Street
Hattiesburg, Mississippi

Earline Boyd
202 Ashford Street
Hattiesburg, Mississippi

Rev. John Wesley Brown
Brooklyn, Mississippi

Alfonso M. Clark
510 E. 6th Street
Hattiesburg, Mississippi

James Avon Cohen
Palmer Crossing
Forrest County, Mississippi

Harold C. Dahmer
Forrest County, Mississippi

Vernon F. Dahmer
Forrest County, Mississippi

Thomas Davis
189 Fredna Avenue
Hattiesburg Mississippi

Mrs. Ollie Josephine Doss
Palmers Crossing
Forrest County, Mississippi

Jackson Gibson
817 Atlanta Street
Hattiesburg, Mississippi

Victoria Jackson Gray
Palmers Crossing
Forrest County, Mississippi

George G. Harper
820 Atlanta Street
Hattiesburg, Mississippi

John Henry
Palmers Crossing
Forrest County, Mississippi

Bennie Hines
Palmers Crossing
Forrest County, Mississippi

Catherine Jackson
Palmers Crossing
Forrest County, Mississippi

Sherman Earl Jackson, Sr.
526 E. 9th Street
Hattiesburg, Mississippi

Rev. Sam Hall
1212 Putman
Hattiesburg, Mississippi

Annie Mae James
5001 Ruby Avenue
Hattiesburg, Mississippi

Arthur James
500 1/2 Ruby Avenue
Hattiesburg, Mississippi

Jimmie James, Jr.
Palmers Crossing
Forrest County, Mississippi

Rev. Dewey Johnson
1008 Franklin Street
Hattiesburg, Mississippi

George Kelly
Eatonville
Forrest County, Mississippi

Robert Lynwood Lewis
308 Scoobo Street
Hattiesburg, Mississippi

Clarence E. Magee
1214 HallAvenue
Hattiesburg, Mississippi

Carrie Mae Magee
1214 Hall Avenue
Hattiesburg, Mississippi

Hattie Pearl Moore
Airport Inn
Forrest County, Mississippi

Patricia Louise Perryman
611 Highland Avenue
Hattiesburg, Mississippi

Annie Kathryn Pool
320 Scooba Street
Hattiesburg, Mississippi

Leonard Preston Ponder
Forrest County, Mississippi

David E. Roberson
805 Dobbs Street
Hattiesburg, Mississippi

Edna Ruth Ross
208 Barry Street
Hattiesburg, Mississippi

Ira Sandifer
511 New Orleans Street
Hattiesburg, Mississippi

Jesse Lenon Stegall, Sr.
320 Scooba Street
Hattiesburg, Mississippi

Bettie Jean Stepps
Forrest County, Mississippi

Wayne Sutton
308 Pauline Avenue
Hattiesburg, Mississippi

Willie Thigpen
900 John Street
Hattiesburg, Mississippi

Theodor F. Williams
Palmers Crossing
Forrest County, Mississippi

Andrew Wilson
207 Ruby Avenue
Hattiesburg, Mississippi

Gladys Woods
100 Coleman Avenue
Hattiesburg, Mississippi

Willie J. Woods
100 Colman Avenue
Hattiesburg, Mississippi

b. to cease requiring Negro applicants for registration, in completing the sworn written application to read, write, or interpret any section of the Mississippi Constitution any more difficult or stringent than those sections or provisions of that Constitution which white applicants for registration ordinarily

and customarily receive; and in any event none other than those given solely to white applicants between November, 1960 and March 5, 1962, such as:

Section 118
Section 128
Section 139
Section 14
Section 116
Section 226
Section 135
Section 125
Section 13
Section 70
Section 10
Section 16
Section 258
Section 273

c. to cease rejecting the applications of Negro applicants and to cease denying registration of Negro applicants on the grounds that they made errors or omissions on their application forms, if the applicant meets the following substantive qualifications:

(1) that he is 21 years of age or older;

(2) that he is a citizen of the United States and a resident of Mississippi;

(3) that he has resided in the State of Mississippi for two years and in his election district for one year, unless exempted from such requirement under Mississippi law;

(4) that he has not been convicted of one or more of the disqualifying crimes enumerated in Section 241 of the Mississippi Constitution;

(5) that he is not an idiot or an insane person;

(6) that he can read and write and reasonably interpret one of the sections of the Mississippi Constitution referred to in paragraph 2(b) of this Judgment and Order and demonstrate an understanding of the duties and obligations of citizenship;

(7) that he supports the Constitution of the United States and the State of Mississippi and will bear true faith and allegiance to the same.

and if any such applicant's application form does not reflect that he or she possesses any one or more of the above qualifications, to notify such applicant of the specific deficiency or deficiencies and afford such applicant the opportunity to correct the error or omission and to supply the needed information with respect to the above qualifications. Said opportunity to correct the deficiency is to be at the time the applicant executes the sworn written application.

d. permit the Attorney General of the United States or his authorized representative to inspect, copy, and photograph any or all registration records in the custody, possession or control of the office of the Circuit Clerk of Forrest County, Mississippi, at any and all reasonable times during regular office hours

3. It is further ORDERED and ADJUDGED that Theron C. Lynd, in order to purge himself of civil contempt of this Court, shall take the following steps:

a. Within 10 days of the date of this Order and Judgment, perform and comply with paragraph 2(a) of this Judgment; and

b. Within 5 days thereafter file with the Clerk of this Court his written signed statement showing that (i)

he has complied with the foregoing item 3(a) and that (ii) he will faithfully abide by and comply with this Judgment, the Orders of this Court heretofore served on him on April 14 and 18, 1962; and failing such compliance Theron C. Lynd shall be committed to and remain in the custody of the Attorney General for imprisonment until compliance and performance is effected. Filing of this statement under (ii) and compliance therewith shall not restrict or abridge the right of Theron C. Lynd to appeal from the Judgments or Orders therein enumerated or to contest the validity thereof in a Court of appropriate jurisdiction.

4. It is further ORDERED and ADJUDGED that all costs taxable under the statutes of the United States as court costs are hereby taxed against Theron C. Lynd.

5. Until such time as the Orders of this Court served on Theron C. Lynd on April 14 and 18, 1962, and any extension or continuation thereof shall expire by the terms thereof, this civil contempt cause shall remain on the dockets of this Court subject to the further orders of this Court.

Entered the 15th day of July, 1963.

/s/ John R. Brown
United States Circuit Judge

/s/ John Minor Wisdom
United States Circuit Judge

/s/ Griffin B. Bell
United States Circuit Judge

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ G. F. Gahucheau
(Seal) Deputy

New Orleans, Louisiana, JUL 15, 1963.

APPENDIX "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 19,576

UNITED STATES OF AMERICA,
Appellant,

vs.

THERON C. LYND, Circuit Court Clerk and Registrar, Forrest County, Mississippi; and STATE OF MISSISSIPPI,

Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(July 15, 1963.)

(Advance Sheet, October 7, 1963, Fed. Rep., 2d Series, Vol. 321, p. 26.)

Before BROWN, WISDOM and BELL, Circuit Judges.

PER CURIAM: When this case was first appealed, the Government sought and this Court granted a preliminary injunction pending appeal. *United States v. Lynd*, 5 Cir., 1962, 301 F.2d 818.

Since that time the full record has been filed together with extensive briefs of all parties. For all practical purposes, the issues on the merits of the appeal are the same

as those with which we had to deal earlier. These are set out with sufficient fullness in our prior opinion. Reconsideration of them in the light of the full briefs and record leads us to reaffirm our former conclusions. We therefore hold that there was an appealable order. Likewise, on the merits, we hold that, under appropriate standards of appellate review, the facts were such that it was error for the District Court in effect to deny the application for preliminary injunction.

Since a further trial is required it is necessary that we rule on those procedural points which may have a bearing on the proceedings on remand. As to the problem of pleading, we adhere to our former ruling that "it is clear that there was no justification for the Court's requiring the Government to amend its complaint in this civil rights action to allege specific details of voter discrimination as if this were an action for fraud or mistake under Rule 9, Federal Rules of Civil Procedure." 301 F.2d 818, 822. *Conley v. Gibson*, 1957, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. The District Court also imposed unjustified restrictions on the scope of the evidence. The evidence to establish a pattern and practice is not confined to the incumbency of Registrar Lynd. Neither is it limited as to the State by the effective date of the 1960 amendments to the Civil Rights Act. 42 USCA §1971. A broad latitude is to be allowed. *United States v. Dogan*, 5 Cir., 1963, 314 F.2d 767; *Kennedy v. Lynd*, 5 Cir., 1962, 306 F.2d 222, cert. denied, 371 U.S. 952, 83 S. Ct. 507, 9 L. Ed. 2d 500; *Alabama v. United States*, 5 Cir., 1962, 304 F.2d 583, aff'd, 371 U.S. 37, 83 S. Ct. 145, 9 L. Ed. 2d 112. So far as the Government's complaint on production of voter records is concerned we doubt that it will any longer be a problem in light of *Kennedy v. Lynd*, 5 Cir., 1962, 306 F.2d 222, cert. denied, 371 U.S. 952, 83 S. Ct. 507, 9 L. Ed. 2d 500.

and the District Court's own subsequent decision in In re Coleman, S.D. Miss., 1962, 208 F. Supp. 199, which we affirmed, *Coleman* v. *Kennedy*, 5 Cir., 1963, 313 F.2d 867.

Consequently, the case must be reversed and remanded for further and not inconsistent proceedings, including the full trial on the merits. As our procedural rulings bear closely on the showing of a right to injunctive relief, all parties, the Government and Defendants alike, are entitled to offer further evidence in the proceedings on remand. The mandate to be issued hereon will provide that the preliminary injunction previously entered by us is continued in full force and effect until such time as the District Court finally disposes of the case. However, as issuance of an injunction by this Court is most unusual, it is more than ordinarily important that the further proceedings in the District Court move with dispatch.[1] The objective is to terminate the preliminary injunction of this Court at the earliest possible time so that all further or other orders will be those of the District Court. This is in keeping with the general proposition that an appeal from the denial or granting of a preliminary injunction should not ordinarily delay the final trial of the case on its merits. *Cf. Wooten* v. *Ohler*, 5 Cir., 1962, 303 F.2d 759, 760; *Barnwell Drilling Co.* v. *Sun Oil Co.*, 5 Cir., 1962, 300 F.2d 298.

REVERSED AND REMANDED.

BELL, Circuit Judge concurring specially:

I concur, with the following additional statement. This court had the power under the All Writs Statute, 28

1. The pendency of the proceedings for civil and criminal contempt against Appellee Lynd as respondent affords no basis for delay in the proceedings on remand since the record of the evidence in the contempt cases is fully closed and those matters have been taken under submission.

U.S.C.A., § 1651, to take the action it took on the former appeal. *United States versus Lynd*, 5 Cir., 1962, 301 F.2d 818. However, in my judgment it was more properly a matter for mandamus. The issue did not go to a denial of temporary relief as such, but to a delay in granting or denying the relief and this court should have spoken to the District Court through a Writ of Mandamus.

This would have afforded the District Court a chance to be heard. It might have avoided the necessity of this court taking the case over prior to a decision in the District Court. It would have avoided the multitudinous handling, by way of contempt hearings and otherwise, since the grant of the original relief by this Court, with no further action having been taken in the interim on the main case in the District Court. This case serves as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice when courts depart from the time-tested processes of law.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ G. F. Ganucheau
(Seal) Deputy

New Orleans, Louisiana, JUL 15, 1963.

APPENDIX "D"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19,576

UNITED STATES OF AMERICA,
Appellant,

vs.

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, STATE OF MISSISSIPPI; STATE OF MISSISSIPPI,
Appellees.

On the Main Appeal

(August 7, 1963.)

Before BROWN, WISDOM and BELL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed herein July 23, 1963, and the Motion for Withdrawal and Stay of Mandate filed July 25, 1963, and as amended filed July 29, 1963 and August 5, 1963, are each overruled and denied.

It is further ordered that the stay issued July 25, 1963, be extended for an additional period of twenty (20) days from the date hereof to enable the parties to obtain a stay from the Circuit Justice, the Supreme Court of the United States, or any Justice thereof, pending further review by that Court; unless such a stay is obtained, the several orders of this Court of July 15, 1963, shall be fully complied with.

APPENDIX "E"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19,576

UNITED STATES OF AMERICA,
Appellant,

vs.

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, STATE OF MISSISSIPPI,
Appellee.

Proceedings for Civil Contempt

(August 7, 1963.)

Before BROWN, WISDOM and BELL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed herein July 23, 1963, and the Motion for Withdrawal and Stay of Mandate filed July 25, 1963, and as amended filed July 29, 1963, and August 5, 1963, are each overruled and denied.

It is further ordered that the stay issued July 25, 1963, be extended for an additional period of twenty (20) days from the date hereof to enable the parties to obtain a stay from the Circuit Justice, the Supreme Court of the United States, or any Justice thereof, pending further review by that Court; unless such a stay is obtained, the several Orders of this Court of July 15, 1963, shall be fully complied with.

APPENDIX "F"

Fourteenth Amendment to United States Constitution

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United

States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive, or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor, is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

Art. I, § II. Constitution of the United States

Section II

1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 244 of the Constitution of Mississippi:

Every elector shall, in addition to the foregoing qualifications be able to read and write any section of the

Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government.

The person applying to register shall make a sworn, written application for registration on a form to be prescribed by the state board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said application to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of such disability, shall be written at his unassisted dictation by the county registrar.

Any new or additional qualifications herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

Section 3235 of the Mississippi Code of 1942, Annotated:

Every inhabitant of this state, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one (21) years old and upwards, who has resided in this State two (2) years, and one year in the election district or city, town, or village in which he offers to vote, and who is able to read and write any section of the constitution of the state and who can

give a reasonable interpretation thereof, and who can demonstrate a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government, and who shall have been duly registered as an elector by an officer of this state under the law thereof, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy, and who has paid all taxes which may have been legally required of him, and which he has had an opportunity to pay according to law, for the two (2) preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid such taxes on or before the first day of February of the year in which he shall offer to vote, shall be a qualified elector in and for the election district or city, town, or village of his residence, and shall be entitled to vote at any election held not less than four (4) months after his registration; but any minister of the gospel, in charge of an organized church, or his wife, legally residing with him, shall be entitled to vote after six (6) months' residence in the election district, city, town, or village, if otherwise qualified. No others than those above included shall be entitled, or shall be allowed, to vote at any election; provided, that a person unable to read or write by reason of physical disability shall, if otherwise qualified, nevertheless be entitled to vote, and provided further that any new or additional qualifications herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954.

Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part):

A person shall not be registered unless he be able to read and write any section of the constitution of this state

and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; he shall also demonstrate to the county registrar that he is a person of good moral character.

The person applying to register shall make a sworn, written application for registration on a form prescribed by the state board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said application to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of such disability, shall be written at his unassisted dictation by the county registrar. As originally enacted each provision is and it is further declared to be mandatory and not directory; no application should have been and shall not be approved or the applicant declared qualified to register to vote unless all blank spaces in the application and the oath are properly and responsively filled out by the applicant; and the oath, as such, shall be signed by the applicant; and the application, as such, shall be signed separately by the applicant at the places thereon provided for applicant's signature.

Provided, however, the provisions herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954; except that from and after the effective date of this act no person shall be permitted to register unless he demonstrates to the county registrar that he is of good

moral character as required by the provisions of Section 241-A of the Constitution of Mississippi.

Section 241-A of the Constitution of Mississippi (Pocket Part):

In addition to all other qualifications required of a person to be entitled to register for the purpose of becoming a qualified elector, such person shall be of good moral character.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

Section 3209.6 of the Mississippi Code of 1942, Annotated (Pocket Part):

The state board of election commissioners shall, as soon as practicable and thereafter at such times as it may deem advisable, consistent with the Constitution, prepare a series of application blanks, including the oath of the person offering to register, in compliance with Section 242 of the Constitution of this state, and including blank forms for furnishing of information, showing date of application, which shall be the date of registration if such applicant be approved for registration; name of applicant; age; occupation; where business carried on; if employed, by whom; place of residence; date such residence began; previous place of residence; what oath applicant takes; if more than one person of same name in precinct, by what name applicant wishes to be called; whether applicant has been convicted, and if so, when and where, of any of the crimes referred to in Section 241 of the Constitution of Mississippi, which are bribery, theft, arson, obtaining money under false pretenses, perjury, forgery, embezzlement and bigamy, and the moral character of applicant; all designed

to test the ability of applicants for registration to vote to read and write any section of the Constitution of this state and give a reasonable interpretation thereof, and demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; and to demonstrate to the county registrar that applicant is a person of good moral character as required by Section 241-A of the Constitution of Mississippi. Such applications shall be designed to exhibit the essential facts and qualifications necessary to show that such person is entitled to register and vote. Copies of such application blank forms shall be delivered to the county registrar of each county, and such copies shall be supplied to each county registrar as needed. The oath required by Section 242 of the Constitution shall be administered by the registrar. The board of supervisors is authorized to make proper allowances for office supplies reasonably necessary by this act.

If no appeal has been or is taken as provided by law from the ruling of the registrar upon any application for registration, or if any application for registration is abandoned or waived by the applicant therein by making another application for registration before any final judgment of decision has been rendered on any prior application, or otherwise waived or abandoned same, the registrar is not required to retain or preserve any record made under the provisions hereof.

Section 3212.7 of the Mississippi Code of 1942, Annotated (Pocket Part):

1. Within ten (10) days after the receipt by the registrar of any application to register to vote and before consideration is given to the sufficiency of the application, the registrar shall deliver for publication in a newspaper

hereinafter described the name and address of such applicant as stated in said application and shall cause same to be published once each week for two (2) consecutive weeks in a newspaper having general circulation in the county where such applicant has applied to register, but if no such newspaper is published in such county, then publication shall be made in some newspaper published in an adjoining or other county but of general circulation in the county of the residence of the applicant.

2. The said name and address shall be published in said newspaper under a heading entitled: "Applicants for registration to vote." When said publication shall have been completed, proper proof of publication shall be furnished to the registrar and same shall be preserved as a record of his office. The cost of the publication and proof thereof shall be paid by the county out of its general fund at the rate for legal notices.

3. If within fourteen (14) days, exclusive of the date of the last publication of the name or names aforesaid, after the date of the last publication, no qualified elector of the county, other than the registrar, shall have challenged, in the manner prescribed by law, the good moral character of applicant and any other requirement which applicant must meet in order to be qualified to register to vote, the registrar shall within a reasonable time, under the circumstances, determine whether applicant has complied with the Constitution and laws of the State of Mississippi to entitle him to register to vote.

4. If any part or portion of this act is held unconstitutional or invalid, such shall not affect any remaining part or portion hereof.

5. This act shall take effect and be in force from and after its passage. (approved May 26, 1962).

Section 3217-01 of the Mississippi Code of 1942, Annotated (Pocket Part):

The sufficiency and the truthfulness of the statements made in the application to register to vote, and the contents thereof, and the good moral character of an applicant to register to vote are material, and this act is adopted to further enforce the requirements to register to vote as set out in the Constitution and laws of the State of Mississippi.

Section 3217-02 of the Mississippi Code of 1942, Annotated (Pocket Part):

Any qualified elector of the county may challenge the good moral character of any applicant and any other requirement of any applicant to vote within fourteen (14) days after the date of the last publication of the name and address of such applicant by filing with the registrar an affidavit in duplicate setting forth facts upon which the challenge is based. Upon the filing of any such challenge the registrar shall within seven (7) days thereafter, exclusive of the date of the filing of such challenge, send to applicant by certified mail, addressed to him at the address shown on the application, one copy of such affidavit, and notice of the date, time and place where the registrar will hold an administrative hearing to determine the sufficiency of the application or challenge.

Section 2111 of the Mississippi Code of 1942, Annotated:

If any registrar appointed by law to register votes, shall intentionally refuse or neglect to register any voter entitled to registration, or register any voter not entitled to registration, he shall be punished, on conviction, by imprisonment in the penitentiary not less than one year nor more than three years.

APPENDIX "G"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19,576

UNITED STATES OF AMERICA,
Appellant,

v.

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY: STATE OF MISSISSIPPI,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

(April 10, 1962.)

Before TUTTLE, Chief Judge, HUTCHESON and WISDOM, Circuit Judges.

TUTTLE, Chief Judge:

This is a motion for an injunction pending an appeal which the United States seeks to have this Court issue following a refusal by the District Court for the Southern District of Mississippi to grant a temporary injunction, which the government sought under the provisions of 42 U.S.C.A. 1971(a) (The Civil Rights Act touching on voting), it being charged in the government's complaint that

Negro applicants for registration in Forrest County, Mississippi, were not being treated "without distinction of race [or] color." The government has filed a notice of appeal from the denial of the temporary injunction. Pending the disposition of this appeal on the merits, the government has filed this motion by which this Court is asked to enjoin the alleged violations of the voting rights of the Negro residents of Forrest County in certain particulars as to which the government claims that it offered undisputed proof. Such a motion for an injunction pending an appeal is to be found in the All-Writs Statute, 28 U.S.C.A. 1651, which provides that:

> "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 62(g) of the Federal Rules of Civil Procedure also provides that the authority granted to the District Court to grant relief pending an appeal does

> "not limit any power of an appellate court or of a judge or justice thereof . . . to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order, appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

The basis of the government's appeal and its subsequent motion for injunction pending appeal is its contention that it has been completely frustrated in an effort to obtain an order of the trial court putting an end to alleged racially discriminatory acts and practices which the government contended in its complaint have deprived Negro citizens of Forrest County of their right to register and to vote without distinction of race or color. The gov-

ernment's efforts to redress the wrongs which it alleges exist in Forrest County commenced on August 11, 1960, ten months prior to the filing of this suit. At that time the United States formally requested that the defendant Lynd, the Registrar of Forrest County, make his registration records available for inspection and copying under Title III of the Civil Rights Act of 1960. These efforts proving fruitless, the government, on January 19, 1961, filed an enforcement proceeding in the District Court to require production of such records. This action also proved fruitless for, although as this Court said in the recent case of Kennedy, Attorney General, v. Bruce, 5 Cir., 298 F.2d 860, an order granting the government the right to make such an inspection should have been issued "as a matter of course," the trial court failed for nearly six months to grant such order. Thereupon, on July 6, 1961, this present suit was filed. Thereafter, on February 15, 1962, the court dismissed the enforcement proceeding as "abandoned." This action was taken, so the trial court said, because after the government filed its suit for injunction on July 6, 1961, and moved for discovery of the official registration records of Forrest County under Rule 34 of Federal Rules of Civil Procedure, the trial court considered that this effort, which it also blocked, superseded the enforcement proceeding.

In the meantime, the instant litigation was delayed from time to time by dilatory motions, including motions to quash the Rule 34 motion, and including motions to make more definite statement, none of which, of course, should stand in the way of a prompt disposition of a motion for temporary injunction.

Briefly stated, the net effect of the several procedural steps taken by the parties is that the trial court finally set down for hearing the motion for temporary injunction on

March 1, 1962, eight months after the suit for injunction was filed, and the posture of the parties was that defendants had objected to, and the trial court had sustained their objections, to giving any access to the records of the Registrar, although at the same time defendants had insisted, and the court had sustained their insistence, on the government's amending its complaint to allege in great detail the name of each applicant who had sought and been denied the right to register, the date of each such application, the name of each Negro who had been refused the right to register, the dates involving any discriminatory mishandling of any Negro registration applications, the names of white people allowed to register who possessed no better qualifications than such Negroes denied the same privilege, and other facts and circumstances showing such discrimination in each of said instances. Moreover, the court had sustained objections by the defendants to the inclusion among the alleged complaining Negro applicants of any who had been denied the right to register or who claimed a discriminatory practice which had occurred prior to February 26, 1959, the beginning of defendant Lynd's term of office. Out of the 63 Negroes whose names the government had supplied by an amendment to the complaint, the trial court required that all but 40 of these be eliminated because the incidents as to which they were identified occurred prior to this date.

The injunction hearing finally came on for trial on March 5th and continued through March 7th. At this time sixteen of the Negroes whose names had been furnished by an amendment to the complaint testified as to experiences with which they were familiar. The government also undertook to prove discriminatory practices by sixteen white witnesses who had been found to be willing to testify in spite of the refusal of the Registrar with approval of the

Court, to make any records of white voters available to the complainant. During the trial it appeared that the defendants actually had in court certain voting records of the Negro witnesses, and the court required that these be turned over to the United States. The court also required that the records touching on the registration experiences of the white witnesses be turned over to the United States, but that they should not be turned over until after the government completed its case in chief. They were actually turned over as to six white witnesses only after the government closed.

Notwithstanding the well-nigh impossible task of showing the true facts, the witnesses produced by the government proved without question that certain serious discriminations had taken place during the term of office of the defendant Lynd. At the conclusion of the presentation by the government of its evidence, the State and the defendant Lynd both reserved the right of cross-examination and deferred such cross-examination. The defendants then declined to put on any evidence but stated that it would take thirty days to be prepared to file answers to the amended complaint and to prepare for introducing defense witnesses. Thereupon the government moved the Court to issue a temporary injunction. Without doing so, and declining either to grant or refuse a temporary injunction, in terms, the court failed to comply with the motion and granted a recess of thirty days to permit the defendants to file their answer and to prepare for proving their defensive case.

At the time the government made its motion for temporary injunction it is plain that the following facts relevant to the complaint that Negro applicants had been denied equal rights to register and vote in Forrest County had occurred:

(1) No Negro had been registered in Forrest County during defendant Lynd's term of office. There were forty Negroes who were named in the amended complaint who attempted to register during this period; sixteen of them testified that they attempted to register on one or more occasions since February 26, 1959, one of them four times. None was registered.

(2) No Negro was permitted even to apply for registration prior to January 31, 1961. Those who attempted to do so were told by one of the deputies that they had to see Mr. Lynd personally, and if they saw Mr. Lynd they were told by him that he couldn't register them, but he gave no reason and gave no time when he would undertake to do so.

(3) Prior to January 31, 1961, most, if not all, of the white applicants were permitted to register without filling out an application form. It is undisputed that many persons were registered without these formalities.

(4) From January 31, 1961, to the present, obviously qualified Negroes were rejected for registration unless the Registrar has some basis for denying the right to register which has not been communicated to them. Among these are five school teachers in the public schools of Hattiesburg or Forrest County, Mississippi; six of them hold baccalaureate degrees from colleges, and three of them have degrees of Master of Arts.

(5) In spite of the government's contention that no named white person during the defendant's entire tenure in office had been rejected for registration, none of the defendants nor their deputies were able to testify to any individual white person who had been rejected.

(6) From the date when the defendant started to use the application forms for white applicants, the defendant's

deputies received applications from white applicants, but refused to receive them from Negro applicants. It was conceded that the Registrar himself was engaged in court as the Circuit Court Clerk two and one-half weeks each month, and was thus frequently unavailable.

(7) The defendant Lynd and his deputies assisted white applicants in filling out their application forms, but refused assistance to Negro applicants. Among the few white registered voters who were found to testify for the government, most of them testified either that they had not been required to fill out forms at all, that they filled them out incorrectly and received aid from the defendant, or were otherwise assisted in completing their registration.

(8) The defendant Lynd refused to give reasons to Negro applicants as to the reason or cause for their rejection, and he required that such applicants wait six months before reapplying for registration, although there is no provision in the statute authorizing such conduct.

(9) All of the sixteen Negro witnesses who testified at the trial were required to write and interpret different provisions of the Mississippi constitution from those provisions of the Mississippi constitution that were submitted to white applicants who testified.[1]

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1. Three of the Negro witnesses testified that they were required to interpret Section 178, the last sentence of which is:

> "In assessing for taxation the property and franchises of corporations having charters for a longer period than ninety-nine years, the increased value of such property and franchises arising from such longer duration of their charters shall be considered and assessed; but any such corporation shall have the right to surrender the excess over ninety-nine years of its charter."

Although we do not here repeat the text of the several sections given to the Negro witnesses and those given to the white wit-

We are not now considering the appeal from the refusal of the trial court to grant the temporary injunction on the merits. We are considering only the motion of the government that we grant a temporary injunction pending the hearing of the appeal. We, therefore, do not have for decision the numerous rulings of the trial court, either in relation to the original enforcement suit seeking access to the records or in the present suit for injunction. However, we cannot fail to comment briefly on the course of the litigation because of its direct bearing on the contention of the government that the refusal of the trial court to grant the temporary injunction justifies our granting this relief pending the appeal. We, therefore, point to the fact that this Court has, in the case of Crum Dinkens v. Attorney General of the State of Alabama, 5 Cir., 285 F.2d 430 and in Kennedy, Attorney General, v. Bruce, supra, clearly laid down the rule that the government is entitled to have an order of the trial court authorizing it to inspect the voting records such as are here involved upon the simple assertion by the Attorney General of the United States that there are reasonable grounds for belief that certain voters are being discriminatorily denied their voting rights in a given county. See 42 U.S.C.A. 1971(c). We have thus held that such allegation need not be enlarged or expanded by supplying detailed information such as was required by the Court in the case on appeal. Likewise, it is clear that there was no justification for the court's requiring the government to amend its complaint in this civil rights action to allege specific details of voter

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nesses. a reading of them demonstrates beyond any question that by any objective standard those supplied to the Negro applicants were longer, more complicated, and more difficult. Ten white witnesses testified that they were not required to write or interpret any provision of the Mississippi constitution.

discrimination as if this were an action for fraud or mistake under Rule 9, Federal Rules of Civil Procedure. These matters are commented on not as a final adjudication of the legal points involved, since they have not been briefed and are not now before us on appeal, but because they are relevant in our considering the need at this time, after nearly nine months following the filing of the suit, to enjoin such discriminatory practices as now appear to be fully proved.

The first objection of the defendants to our granting this relief is that the trial judge did not enter a formal order "refusing" a temporary injunction. He simply failed to do so, although the government made a formal motion during and at the end of its presentation of evidence for the issuance of such an injunction. The movant, under such circumstances, was clearly entitled to have a ruling from the trial judge, and since he did not grant the order his action in declining to do so was in all respects a "refusal," so as to satisfy the requirements of Section 1291. We hold, therefore, that the failure of the trial court to grant the temporary injunction constituted an "interlocutory order of the district court . . . refusing . . . an injunction." Such order is appealable.

The defendants' next contention is that it would be entirely inappropriate for the court at this time, as they claim it would have been for the trial court at the end of plaintiff's testimony, to grant a temporary injunction, because the State has not filed its answer and has not put on its proof. This contention entirely overlooks the nature of a temporary injunction, which is a writ of the trial court, or, in this instance, of an appellate court, issued to protect the rights of any person moving for it upon his making a showing that he is entitled to it. The grant of a temporary injunction need not await any procedural steps

perfecting the pleadings or any other formality attendant upon a full-blown trial of the case. The defendant may, of course, make such counter showing as it deems wise or necessary to meet such proof as is produced by the moving party. Where, however, as is here the case, the plaintiff made a clear showing that rights which it sought to vindicate were being violated, and and that no response or counter-proof would be available for some considerable period after these rights should have been, but had not been, taken under consideration by the trial court, the plaintiff has satisfied every requirement for the granting of temporary relief pending a final adjudication of the appeal.

We conclude that the likelihood that the court's refusal to grant the temporary injunction will be reversed as an abuse of discretion is sufficiently great that we are warranted in protecting the rights of the Negro registrants pending a decision on this issue by this Court.

Therefore, pending a final determination of the appeal now pending in this Court, the defendants, their agents, employees, successors, and all persons in concert with them are hereby enjoined from engaging in discriminatory acts and practices based on race in the registration for voting in Forrest County, Mississippi, and they are expressly enjoined from:

(1) Denying Negro applicants the right to make application for registration on the same basis as white applicants;

(2) Failing to process applications for registrations submitted by Negro applicants on the same basis as applications submitted by white applicants;

(3) Failing to register and to issue registration cards to Negro applicants on the same basis as white applicants;

(4) Denying Negro applicants the right to be registered by the same office personnel and with the same expedition and convenience as are being permitted to white applicants, and from failing or refusing to give to Negro applicants the same privileges as to reviewing their application forms at the time they are filled out and advising Negro applicants of such omissions as appear on their forms as they are now or heretofore have given to white applicants under similar circumstances;

(5) From administering the constitutional interpretation test to Negro applicants by including as sections to be read and interpreted any sections other than those which at the time of the trial had been used for submission to white applicants;

(6) From requiring rejected Negro applicants to wait any different period before reapplying for registration than may be authorized under the laws of Mississippi and other than is required of white applicants.

In view of the immediate pendency of termination of registration proceedings prior to an early election, it is ordered that this injunction shall be effective immediately, and that the judgment and order of this Court be transmitted forthwith to the Clerk of the District Court for the Southern District of Mississippi, and that the Clerk of this Court send a certified copy hereof to each party defendant, said service to be made upon counsel of record.

A true copy.

Test: Edward W. Wadsworth
Clerk, United States Court of Appeals, Fifth Circuit

By s Clara R. James
(Seal) Deputy

New Orleans, Louisiana April 10, 1962

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 576

THERON C. LAND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, AND STATE OF MISSISSIPPI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A13-A16) is reported at 321 F. 2d 26. The judgment and order of civil contempt is printed in Appendix B of the petition.

JURISDICTION

The orders of the court of appeals were entered on July 15, 1963 (Pet. A3, A12), and rehearing was denied on August 7, 1963 (Pet. A17, A18). The petition for a writ of certiorari was filed on October 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction of an appeal from a district court's refusal to act on an application for a preliminary injunction.

2. Whether the individual petitioner was properly held in civil contempt of the court of appeals' injunction.

STATEMENT

On July 6, 1961, the United States filed an action in the United States District Court for the Southern District of Mississippi under the Civil Rights Acts of 1957 and 1960 (42 U.S.C. 1971), alleging that petitioners had engaged in racially discriminatory acts and practices which deprived Negro citizens in Forrest County of their right to register and to vote without distinction of race or color; that such deprivations were and are pursuant to a pattern and practice; and that, unless restrained, petitioners would continue to engage in their racially discriminatory conduct. The prayer was for preliminary and permanent injunctions (R. 2, 249).

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[1] "R." refers to the Transcript of Record filed with the court of appeals.

It was charged specifically that petitioners applied different and more stringent standards to Negroes than to white persons in determining their qualifications to vote; that they refused to afford Negroes an opportunity to register equal to that afforded white persons; that they unreasonably delayed the receipt of Negro applications; and that they arbitrarily refused to give Negroes an opportunity to apply for registration.

After lengthy procedural delays, the motion for a preliminary injunction was heard on March 5-7, 1962 (R. 524). The court refused either to grant or to deny the motion (R. 1195-1196) and the government appealed (R. 1216). On April 10 and April 16, 1962, the court of appeals issued an injunction pending appeal and ordered petitioner Lynd to cease specifically designated practices of racial discrimination in connection with Negro applicants for registration. *United States* v. *Lynd*, 301 F. 2d 818 (Pet. 6). This Court denied certiorari, 371 U.S. 893, No. 355, Oct. Term, 1962.

When Lynd failed to comply with the interlocutory orders of the court of appeals, the government, on April 30, 1962, instituted criminal and civil contempt proceedings against him in the court of appeals. On July 15, 1963, Lynd was found to be in civil contempt (Pet. A4). The court of appeals ordered him

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For example, Negroes were given long and difficult passages of the Mississippi Constitution to read and interpret, while white applicants, if given the constitutional test at all, were given short and less difficult sections (Pet. A35-A36).

to register 43 named Negroes who had been illegally denied registration; to cease requiring Negroes to interpret sections of the Mississippi Constitution more difficult than those assigned to white applicants; to assign no sections for interpretation other than those given white applicants from November 1960 to March 5, 1962; to cease rejecting Negro applicants on the grounds of errors or omissions on their application forms if the applicants otherwise meet certain specified substantive qualifications of state law; and to notify Negro applicants of specific deficiencies on their application forms and afford them an opportunity to correct such errors.

On the same date the court of appeals, now having considered the appeal on the merits,[3] reversed and remanded the judgment of the district court denying the preliminary injunction (Pet. A1).

The petition for certiorari challenges both the judgment of civil contempt and the court of appeals' reversal of the district court's denial of the preliminary injunction.

ARGUMENT

In its present posture this case involves no questions that were not raised by or available to petitioners on their earlier attempt to seek review in this Court of the court of appeals' interlocutory orders. Challenges to the court of appeals' assumption of jurisdiction and to the propriety of its orders were made

[3] The appeal was submitted on a complete record and briefs. Oral argument was waived by all parties (Pet. A1, A13).

at that time. Certiorari was denied. 371 U.S. 893. The instant petition concerns identical or similar issues, all of which were correctly decided by the court of appeals, and none of which requires further review by this Court.

1. Petitioners assert again that the court of appeals lacked jurisdiction because the district court entered no appealable order. But the court of appeals correctly held in its earlier opinion that "the failure of the trial judge to grant the temporary injunction constituted an 'interlocutory order of the district court * * * refusing * * * an injunction.' Such order is appealable." 301 F. 2d 818, 822 (Pet. A37). A preliminary injunction runs only until the district court decides the merits of the case in granting or refusing a permanent injunction. By refusing to act after more than eight months had elapsed since the institution of the suit, the district court, in effect, held that it would grant no relief until procedures normally associated with requests for permanent injunction were completed. This course deprived the government of the right to a preliminary injunction, and hence was the equivalent of an express denial of such an injunction.

2. Petitioners repeat their contention that there was no official record before the court of appeals, and argue that this ousted the court of jurisdiction (Pet. 19-24). This argument can relate only to the judgment previously attacked unsuccessfully by petitioners in this Court, since it was only at the hearing of April 6, 1962 that the court of appeals had no official transcript of the proceedings in the district

court.[1] The certified official transcript was before the court in the contempt proceeding and during its consideration of the appeal on the merits. Consequently, the judgments which petitioners are now seeking to have reviewed were entered after appellate consideration of duly certified records.

3. Petitioners' contention that the court of appeals' injunction and contempt order were improper because they required petitioner Lynd to violate the Mississippi Constitution and the Mississippi Code (Pet. 24-30) are patently frivolous. Mississippi law does provide that an applicant for voting registration be able to write and interpret "any" section of the state constitution. However, this requirement obviously does not compel the voting registrar to select any particular provision of the constitution for examination purposes. By restricting the registrar's choice to those sections which have, in the past, been assigned to white applicants, the court of appeals was merely requiring equality in the administration of the standard; it was not compelling violations of Mississippi law.

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[1] As discussed in our Brief in Opposition to petitioners' previous petition for certiorari (No. 355, 1962 Term), the court of appeals did have before it an "unofficial" transcript prepared by court reporters who had been engaged by the government. Petitioners have failed to demonstrate that this transcript contained any material errors or inaccuracies. In light of the need for prompt action by the court of appeals, this procedure was surely sufficient to meet the requirements of Rule 75(j) of the Federal Rules of Civil Procedure. See Brief in Opposition, No. 355, 1962 Term, pp. 7-8.

Nor is there any merit to the additional claim that petitioner Lynd is required, by the terms of the civil contempt order, to violate other sections of the Mississippi Constitution and the Mississippi Code. Although Section 241-A of the Mississippi Constitution (Pet. A25) provides that voting applicants must demonstrate "good moral character," the court of appeals was fully justified, in light of the record before it, in disregarding such a vague standard and establishing objective criteria for registration in Forrest County so as to prevent circumvention of its order. Cf. *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), affirmed, 336 U.S. 933. Similarly, § 3213 of the Mississippi Code, enacted *after* the April 1962 injunction entered by the court of appeals, which renders "mandatory and not directory" the previously existing statutory provisions requiring applicants to complete their applications correctly without assistance (Pet. A24), could be disregarded as an impermissible effort to "freeze" the electorate in its white mold. Cf. *Guinn* v. *United States*, 238 U.S. 347; *Lane* v. *Wilson*, 307 U.S. 268; *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas*, 362 U.S. 58; *United States* v. *Penton*, 212 F. Supp. 193 (M.D. Ala.); *United States* v. *Dogan*, 314 F. 2d 767 (C.A. 5). Moreover, whether this subsequent change of local law required an amendment of the outstanding orders of the court of appeals was a question which should have been presented by petitioners in that court on motions for modification or clarification. The issue cannot be raised by disobedience of the court de-

cree. See *Muller* v. *Henry*, 17 Fed. Cases 978, No. 9916; *Yanish* v. *Barber*, 211 F.2d 467, 470 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

HAROLD H. GREENE,
ISABEL L. BLAIR,
Attorneys.

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